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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANTS' REPLY TO SEC BRIEF

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This brief in reply to the Brief for the Securities and Exchange Commission as Amicus Curiae is filed pursuant to permission granted appellants by the Court during oral argument on April 17, 1979.

The Interest of the Securities and Exchange Commission Has Not Focused on Areas Within Its Expertise

The Securities and Exchange Commission (hereafter "SEC" or "Commission") has a working familiarity with and understanding of the parameters of sections 27 and 28(a) of the Securities Exchange Act of 1934 [15 U.S.C. §§ 78aa and 78bb(a) (1970)] which might have aided this

Court in grapping with the thorny jurisdictional problems raised by attempts to define the words "violation" in section 27 and "conflict" in section 28(a) in a convoluted manner by the courts below. Instead, and in a manner that does not do justice to the concept of a "friend of the Court," the SEC asserts a posture under the Commerce Clause (wholly within the expertise of this Court) and under the Supremacy Clause regarding the constitutionality of state corporate takeover laws vis-a-vis the federal Williams Act with the aim of achieving a goal indirectly that it has been unwilling to advance to Congress or take directly by its own court challenge to state laws.

ARGUMENT

I

THE IDAHO CORPORATE TAKE-OVER LAW IS VALID UNDER THE COMMERCE CLAUSE.

A. State Laws Provide for Increased Benefits and Protections for Shareholders

Beginning at page 14, Brief of SEC, and continuing throughout, the term "delay" is given a negative connotation. In fact, the term "delay" is defined as an unproductive waste of time. Yet, what really happens in the context of cash tender offers is that state laws such as Idaho's create an *extended period of time for shareholder benefit* which results in additional time for deliberation and opportunity for an auction market and increased offer prices to occur. Even the SEC, as is discussed below, has now proposed an extension of time to complete a tender offer to 30 business days (42 calendar days)—a period in all likelihood longer than would occur under Idaho's statute.

Directors of a target company faced with a takeover bid have a fiduciary responsibility to shareholders to review that bid and do whatever is reasonably possible for the protection and best interests, as they view them, of those shareholders who look to them for management of the company. Corporate management must swiftly review and analyze the bid, reach a conclusion, and bring that conclusion to the attention of shareholders as part of their fiduciary responsibility. Time is needed for such consideration. Shareholders may get together and advance individual or group interests to other shareholders regarding a tender offer proposal if they have time in which to act. Yet, the availability of the "Blitzkrieg," or "Saturday night special," short-fused tender offer under the Williams Act, where the bid is a surprise and of short duration, puts immense pressure on shareholders to react. It places even greater pressure on target company management, including its board, to hastily analyze the bid, determine its recommendation, and communicate with shareholders. If this review and comment process must be completed in only a few days it will be done in a less satisfactory manner than if there is adequate time. Often, boards of directors are composed of persons who live in different parts of the country (and on occasion include foreign residents). To bring a large board of directors together to give careful consideration to their responsibilities in a takeover situation takes time, not only to comply with its by-laws to assemble the members, but also to give them adequate information and seek their decision. Federal law, as it now stands, does not allow target company management to exercise their fiduciary role in a considered, responsible manner, nor does it allow the shareholders time to study the situation or to communicate with each other.

Within the confines of the Williams Act, a partial tender offer need only be kept open for the ten day proration period and a full tender offer need only be kept open for the seven day withdrawal period. If a tender offeror chose to announce its takeover bid on a Friday, then four out

of the ten days would be non-business days (weekends), leaving only six business days during which a partial offer must remain open. Such a brief period hardly creates an opportunity for effective, meaningful communication with shareholders by target management, and can easily lead to panic tendering. [See A. at 221-22 (Bartell); 248-52 (Wheat); Trial Tr. at 354 (Chatlos).]

Clearly, a principal reason why a takeover bidder wants to be able to operate within the brief time limits of the existing Williams Act provisions is to be able to get the desired shares more cheaply, before an auction market can arise. Coupled with this desire is the prospect of panic tendering by shareholders who know little about the offeror and would rather tender or sell their shares to arbitrageurs than remain shareholders in a company with an unknown future.

A further point, apparently misunderstood by the SEC and the appellate court below, is the unwarranted assumption that *all* information gathered as a result of additional disclosure requirements of Idaho law *must* be disseminated to shareholders. As the circuit court noted: "in the area of financial disclosure it can be true that 'less is more'. Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures." [J.S. App. A-47]. What the court fails to recognize, however, is that the Idaho Corporate Take-Over law, while providing for thorough disclosure by a tender offeror, contains no mandate that unwieldy, unimportant, masses of information be sent to investors of the target company. The information must be filed with the Idaho Department of Finance and be available to investors. A material synopsis of the filed information could then be sent to shareholders either by the tender offeror or by the target company—and shareholders would be protected from false statements or omission of material facts by prohibitions in the Idaho law against fraudulent or deceptive practices. [IDAHO CODE § 30-1505(1)

(Supp. 1978).] Such action would also be consonant with fiduciary obligations of target company management.

At Footnote 42, Brief of SEC, the Commission claims it has asked for fuller disclosure in at least three cases. When contacted by counsel for appellants in this case in an attempt to ascertain when the filings were made and what in the filings prompted the Commission to seek the additional disclosure, SEC personnel would provide no information whatsoever about the three named filings, and counsel was informed that if additional information was desired it would have to be sought through the federal Freedom of Information Act. If counsel for this case before the Supreme Court of the United States cannot obtain information about these filings after the subject has been raised by the SEC itself, it is obvious that it would be a virtual impossibility for a target company shareholder to obtain any such information without great difficulty and in time to be of any material aid in deliberation over action he should take regarding his target company stock. Since the SEC is unwilling to timely provide the material for response by appellants, the appellants request that the Court strike its Footnote 42 and the references therein.

B. Idaho's Law Only Indirectly Affects Interstate Commerce

Federal and state laws interrelate in a variety of areas regarding securities matters where interstate commerce is indirectly or incidentally affected. The Idaho Corporate Take-Over law does not create a unique effect or relationship. Such joint activity applies in the regulation of broker-dealers, required to be licensed by and regulated by the laws of many states and also required to be registered under federal law.

More specifically with regard to changes in corporate control, in the area of proxy contests—an area which may change corporate control—there is a substantial federal

law requirement that sets forth proxy rules, yet there is often some, though less, state law regulation of that process. Exchange tender offers, too, were regulated by federal law prior to the 1968 passage of the Williams Act. If the bidding company was a reporting company under the N.Y.S.E. and the SEC's rules, in order to make an offer of its securities in an exchange tender offer it would have to file a registration statement and have pre-tender processing of the registration statement by the Commission staff. The offer would become effective only after that processing was completed; then the tender could be made. State law also governed (and continues to govern) exchange tender offers. [See Appendix to Appellant's Reply Brief where requirements of Idaho law regulating exchange tender offers are compared to requirements of the Idaho Corporate Take-Over law regulating cash tender offers.] The issuance of securities and the sale of those securities in particular states involved in an exchange tender offer are regulated by many states through the process of either requiring a permit for the issuance and sale of those securities or requiring qualification under the state law with, in many instances, disclosure requirements included in the state law. Thus, at the federal level the extent of federal involvement was full and fair disclosure, whereas at the state level there was a traditional variety of blue sky regulations which might require full and fair disclosure and might even go so far as regulating the fairness of the offer itself.

At the time of adoption of the Williams Act the distinction between the existence of statutory provisions at both the federal and state level for exchange offers and the lack of laws regulating cash offers was fully recognized both by Congress and the SEC; it was an obvious fact. In the initial 1968 version of the Williams Act there was an express exemption for exchange offers made by means of a registration statement, it no doubt being the belief of Congress that in adopting minimal regulation

of cash tender offers they would confine themselves to that medium of tender offer (cash) which had no regulation at the federal level, coupled with Congress' recognition that exchange tender offers did have substantial regulation at both the federal and state levels. Then, in 1970, the exemption was removed and the Williams Act was amended to include within its ambit tender offers of securities registered under the 1933 Securities Act (exchange tender offers).

It, therefore, seems fair to say that in the securities law area, at least, federal and state laws may be different in dealing with the same subject, yet federal law does not oust state law, and state law has not been deemed unduly to burden interstate commerce. Perhaps a prime example of this coexistence is federal law under the Securities Act of 1933 on the issuance and sale of securities, with its extensive disclosure requirement and process, and state law regulating issuance and sale of securities, which include both a disclosure requirement and requirements of findings of fairness by state regulators. Both deal with the same subject, yet they are different in their emphasis, and both are for the same purpose.

In all of the above mentioned fields of dual state and federal regulation, the state laws involved have an extraterritorial effect that extends beyond the boundaries of the regulating state to affect offerors, proxy solicitors, or shareholders wherever they may live. Yet, in none of the described areas can the SEC point to authoritative decisions that the state laws unduly burden interstate commerce.

Though Idaho's, and other, state takeover laws have an extraterritorial reach that the SEC claims is unique, the state laws are analogous to statutes and the common law relating to mergers. If a change in corporate control is to be effected by a merger, federal law requires a registration statement and a process of review of the proxy mate-

rials sent to the shareholders who must vote on the merger, while state law continues to govern the internal affairs of the company, the vote that is required. In some instances, state blue sky laws may require qualification of the issuance of any securities in the merger. In a cash tender offer, the state's concern is seriously implicated with whether or not the offer is extended to shareholders who happen to live in Idaho. The interest of Idaho target shareholders certainly is affected by a tender offer extended only to shareholders who live outside the state. Not only would they not be able to tender directly, but the resulting change in corporate control of the target company would also directly affect their shares.

The concern of Idaho in the welfare of domestic and pseudo-foreign corporations in Idaho and in the welfare of all investors in those companies regardless of where those investors may reside is implicated without regard to whether the tender transaction actually occurs inside or outside Idaho. In tender offers, unlike blue sky legislation, Idaho's *concern* is for the shareholders or owners of corporations with a strong nexus to Idaho, period. And for that reason, the extraterritorial effect or reach of Idaho law is wholly incidental.

The Idaho Corporate Take-Over law merely reaches through the fiduciary relationship of target company management to its shareholders to extend shareholder protection wherever the shareholder may live. The Idaho law is not designed to favor any one bloc of shareholders at the expense of any other and, in fact, prohibits offers that do not treat shareholders substantially equally. [IDAHO CODE § 30-1506(1) (Supp. 1978).] The Commission, at p. 33, Brief of SEC, criticizes the spectre of a multiplicity of state laws as "burdensome," yet at oral argument Great Western conceded that state laws would be constitutional if they only affected shares held by local residents. The Idaho law was structured to avoid such an overlap by defining a "target company" in a way that Idaho law would not be effective unless such a company had a most substantial —paramount—relationship with Idaho.[1] Traditional comity and deference principles which have worked well for years among states in other aspects of securities law should preclude a tender offeror from being subjected to a multiplicity of laws it must abide by. And, by having a law of at least one state where the target company has a substantial relationship govern a cash tender offer in a way that protects all target company shareholders wherever they reside, a tender offeror is precluded from seeking out only those states where a preponderance of the target shareholders reside and making its tender offer in those states to the exclusion of shareholders in other, less populous, states.

While in the instant tender offer for Sunshine Mining Company stock the planning took place in Texas, the offer was announced and handled by investment bankers in New York, and the shares were to be tendered to a Chicago, Illinois, bank, all Sunshine shareholders had a right to look for information and protection from the State of Idaho reaching through to them from the fiduciary relationship Sunshine's management in Idaho had to all shareholders.

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[1] A "target company" is defined at IDAHO CODE § 30-1501(6) and is either:

(a) a company organized under Idaho law; or

(b) a company which

(i) has its principal office in Idaho, and

(ii) has substantial assets located in Idaho, and

(iii) whose equity securities are registered under Idaho law or § 12 of the 1934 Securities Exchange Act

which is or may be involved in a takeover offer relating to any class of its equity securities.

C. State Takeover Laws Have Not Discouraged Tender Offers, for Just as the Number of State Laws has Increased, so has the Number of Tender Offers

Since passage of the Williams Act tender offers have increased, particularly in the last few years, while, at the same time, more states have enacted takeover laws. Based on tender offer reports filed with the Securities and Exchange Commission during the fiscal years 1969 to 1977, the following information emerges:[2]

Fiscal Year Ending June 30	No. of Tender Offers Filed with SEC	No. of State Takeover Laws Existing
1969	70	1
1970	34	2
1971	43	2
1972	50	3
1973	75	3
1974	105	5
1975	113	8
1976[3]	134	20
1977	134	30

Analysis of contested tender offers for corporate control during the years 1976 to 1978 indicates that state takeover laws not only have not discouraged takeover attempts, but

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[2] Data on tender offer filings was derived from the Securities and Exchange Commission's Thirty-fifth through Forty-third Annual Reports. The Commission reports on its activities on a fiscal year, not calendar year, basis. No data has as yet been published by the Commission for its 1978 fiscal year.

[3] In 1976 Congress changed the Government's fiscal year, so that thereafter the fiscal year would end on September 30 rather than June 30. In its Forty-Third Annual Report the SEC reported not only on the 134 tender offers filed in fiscal year 1977, but also reported that 27 tender offer reports had been filed during the transition period between June 30 and September 30, 1976.

also that the bidding price was increased in over half the cases where bids were subject to state takeover laws, yet rarely increased in states without takeover laws.[4] No evidence was introduced by Great Western at trial that any tender offers had been discouraged or defeated as a result of state law. The SEC chose not to participate at trial of this case, and has referred to no evidence of any discouragement or defeat of tender offers by state laws. There is simply no evidence anywhere to indicate that a tender offer was ever not made because of a state takeover

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[4] Analysis of Contested Tender Offers for Control

	1976	1977	1978
No. of Tender Offers for Control			
States with statutes	13	26	42
States without statutes	9	8	3
Total:	22	34	45
No. of Tender Offers in Which Target was Ultimately Acquired			
States with statutes	12	26	41
States without statutes	8	8	3
Total:	20	34	44
No. of Tender Offers in Which Bid was Increased			
States with statutes	7	10	19
States without statutes	4	5	0
Total:	11	15	19
No. of Tender Offers in Which Bid was Increased with no Competitive Bid			
States with statutes	0	5	9
States without statutes	0	3	0
Total:	0	8	9

Source Admitted as Defendant's Exhibit "G" in *Tyco Laboratories, Inc.* v. *Connelly*, No. CA No. 79-0265-T (D. Mass., March 26, 1979).

law, nor is there any evidence to indicate that any tender offers were not made because of the Williams Act. Yet, the SEC continues to postulate that state laws discourage tender offers. At Footnote 21, Brief of SEC, the Commission claims that there is no practical way of testing whether or not state takeover laws have discouraged tender offers. If this is a valid contention, then we should also speculate about how many potential tender offers were discouraged by any negative effect the Williams Act may have. The fact remains that tender offers *have* increased as the number of state statutes has increased.

Assuming arguendo that there might be a deterrent effect on some tender offer bidders as a result of state law provisions, it is well to discern the character of such a potential bidder. If the bidder is one who wants a Saturday night special or blitzkreig opportunity without having to disclose carefully or fully and is not interested in anything else—if he wants to get a bargain with an unfair advantage and if that advantage is not available—he might pass up the opportunity to bid, for state laws tend to make gaining a bargain and a purchase at the expense of the target company shareholders a little more difficult, since the time period allowed for shareholders to make up their minds and for other bidders to come forth (if there are any), together with any additional information required of the tender offeror, might deter that sort of a tender offer. But on the other hand, additional time permits prudent management of other potential bidding companies to participate in any resultant corporate auction and may, in fact, increase the pool of offerors. This, too, is purely speculation, yet is certainly at least as reasonable as the SEC's speculation.

At page 27, Brief of SEC, the Commission indulges in the presumption that the Idaho Director of Finance (because of a lack of a "standard") would act to the detriment of target company shareholders or in favor of target

management when, in fact, there is no reason to believe that the state official would act in any but a neutral manner in seeking additional information and protection for target shareholders. Certainly, the facts herein support only a conclusion of fair, neutral dealing. Great Western does not claim that the additional information sought would not be of benefit to shareholders or that it somehow would give unfair advantage to target management; all that it claims is that it did not want to supply the additional information.

D. The Idaho Corporate Take-Over Law Benefits Shareholders

At page 31, Brief of SEC, the Commission asserts that the Idaho law burdens prospective takeover bidders in several ways. So, too, does the Williams Act "burden" takeover bidders, and, presumably, the proposed SEC 30 business day rule (holding tender offers open for 42 calendar days)[8] will undoubtedly additionally "burden" tender offerors. But, the object of the state and federal laws is protection of and benefit to shareholders of a target company, not minimum burden to a tender offeror—and none of the "burdens" of either state or federal law act to frustrate an offer, for offers continue increasingly to be made.

Next, the SEC complains that the Idaho law "burdens" arbitrageurs because it imposes a longer period during which the arbitrageur is "at risk" than does the Williams Act. [Brief of SEC at pages 35-36.] Certainly, the state laws regulating takeovers are not designed to be "arbitrageur relief acts," nor is that a purpose (though it may be an effect) of the Williams Act as presently constituted. Since the SEC now proposes longer periods during which

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[8] Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240).

tender offers must remain open under the Williams Act, complaint about "delay" under state law seems ill-founded. On the contrary, those arbitrageurs who hold their target company stock during an extended period of time created by state takeover law would also benefit from any increased bid or auction market which the extended period fostered.

Empirical studies demonstrate conclusively that extended periods of time during which tender offers remain open foster entry into the market of competing tender offerors and increase pressure on the initial bidder to raise his bid. A study of contested tender offers during the years 1976, 1977, and 1978 in which time was a factor in affecting the price bid for target company stock is reproduced as an ADDENDUM to this Brief.[6] By merely laying a ruler vertically along the line representing days of time it becomes readily apparent that an extended period of time during which a tender offer remains open results in a premium to shareholders. Between November 1974 and the end of 1978 the additional premium to shareholders from this "delay" has been over 1.2 billion dollars.[7]

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[6] Information compiled by William E. Chatlos of Georgeson & Co.; admitted as Defendant's Exhibit "H" in *Tyco Laboratories, Inc.* v. *Connelly*, No. CA No. 79-0265-T (D. Mass. March 27, 1979).

[7] SUMMARY OF COMPETITIVE TENDER OFFERS

Year	Bids	Average Number of Days From Original Announcement To Final Bid	Mean Number of Days To Completed Offer	Median Number of Days To Completed Offer	Total Premium Over Bid
11/'74—12/'76	37	30.5	52.2	46.5	$ 178.7m
1977	19	59.8	110.8	80	$ 662.9m
1978	40	56.1	92.8	82	$ 362.4m
					$1,204.0m

Source: Distillation of information contained in ADDENDUM to this Brief; Testimony of Mr. Chatlos, (Trial Tr., 374) (A. 288-89); Chatlos, *The SEC vs. investors on tender offers* in Ideas for Action, HARV. BUS. REV. 6, 7 (Sept.-Oct. 1978).

II

THE WILLIAMS ACT DOES NOT PREEMPT THE IDAHO CORPORATE TAKE-OVER LAW.

Nothing in the Williams Act or its legislative history indicates an intent to preempt state securities regulation of corporate takeover bids. To the contrary, the legislative history of the Williams Act demonstrates that Congress expected state law regulation in the same area.[8] The SEC itself informed Congress that it chose to defer to the

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[8] The SEC recommended as an amendment what was passed in 1968 as section 14(f) of the Williams Act regarding agreements about directors being replaced. But the SEC, at whose suggestion this amendment was made, recognized the new provision would not supersede state law, and that the ordinary rule of section 28(a) would apply. The applicable comment states:

> Our proposed amendment would not supersede the provisions of state law permitting the substitution of directors without a meeting of stockholders; it would simply assure that the type of disclosure made to stockholders prior to a meeting to elect directors would similarly be made available to them in this situation.

Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Commerce, 90th Cong., 1st Sess. 40 (1967).

Speaking during the 1968 House of Representatives hearings on what was to become the Williams Act, New York Stock Exchange official Donald L. Calvin noted:

> Mr. CALVIN. In addition, all statements filed with the SEC would be subject to current provisions of State and Federal securities laws, which would protect those shareholders whose shares are being solicited by a tender offer from fraudulent and deceptive practices.

Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Con., 2d Sess. 49 (1968).

States in an area that directly affected the "balance" between the offeror and the target company.[9]

When Congress acts in an area in the face of existing state laws and says nothing about an intent to oust those laws or to prevent further state laws or to occupy the field, this Court should not infer an intent to preempt.[10] In fact, congressional silence in the face of state laws in the field should be interpreted as congressional approval of those laws.

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[9] In a 1970 dialogue between Senator Packwood, Mr. Loomis (who was at that point general counsel of the SEC), the following transpired:

> Senator PACKWOOD. When similiar legislation was being considered in 1968 there was some question whether the SEC had authority of tender offer [sic.] to insist that management provide a bidder with a stockholder list. To round off the record of those hearings, I would appreciate it if you could inform us whether the SEC possesses such authority today and whether it has been exercised. If not, do you not think in all fairness to all bidders that these should be made available? Could this authority be vested in the SEC pursuant to the rulemaking provisions which are incorporated in this bill?
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> • • • • • •
>
> Mr. LOOMIS. The Commission does not now exercise the power to require the company to furnish the bidder a stockholders' list. We leave that to State law which generally governs when someone can get a stockholders' list. There is some question, and I think some difference of opinion among the Commission staff, as to whether under present law we have this power. It might be that enactment of this legislation would increase the likelihood that we have it, but there is a serious question of policy as to whether we should intervene, so to speak, on behalf of the bidder and require the management against its will to provide him with a stockholders' list rather than leaving that to the State courts.

Hearings on S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 27-28 (1970).

[10] *See* New York Telephone Co. v. New York State Dep't of Labor, 47 U.S.L.W. 4303 (U.C. S.Ct., March 21, 1979).

To make out a case of implicit preemption there must be a clear showing that Congress intended to occupy the field, and such a contention is belied by the existence of section 28(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78bb(a) (1970)] with its recognition of the right of nonconflicting state laws to coexist with federal law in the securities field as well as the traditional interrelationship between state and federal securities laws. There is clearly no explicit preemption, either.

All that is left is operational or conflict preemption, and for that to be found there must be an unambiguous, demonstrable frustration of a clear and significant congressional purpose.[11]

When Congress passed the Williams Act in 1968, Virginia already had a takeover law. When Congress amended the Williams Act in 1970 there were three state takeover laws. And, in the 1970 amendments Congress did affect state jurisdiction in that it eliminated the exemption for exchange tender offers that existed in the Williams Act as originally passed. Congress had to be cognizant of the fact that exchange tender offers were subject to state blue sky laws, yet it took no action with regard to applicability of state law and added a layer of federal regulation to the layer of state regulation—and thereafter the two have coexisted.

In 1975, with 11 state takeover laws extant, Congress made it clear that it was focused on preemption in a related area when it amended section 28 of the Securities Exchange Act of 1934 to add subsection 28(e) [15 U.S.C. § 78bb(e) (1976)]. The new subsection authorizes a person exercising investment discretion (an investment advisor), if he does so in good faith, to pay a larger commission to one broker in the purchase and sale of securi-

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[11] *See* Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L. Q. 679, 688-93 (1979).

ties than he might have paid to another. The investment advisor, in a fiduciary role, need not seek the very lowest commission if he in good faith believes that the commission was reasonable in relation to the value of the brokerage and research provided by the broker. Section 28(e) expressly preempted pre-1975 state law regarding breach of fiduciary duty and expressly permits post-1975 legislation, state or federal, which would be in conflict with the newly-added § 28(e) provision. Further, in the Securities Act Amendments of 1975, Congress added section 13(f) [15 U.S.C. § 78m(f) (1976)] to the Williams Act, requiring disclosures by various kinds of institutional investors of a certain size. The 1975 amendments to the Securities Act were characterized by Congress as one of the most extensive reviews of the Securities Exchange Act of 1934 ever undertaken, yet Congress failed to affect or displace state takeover laws.

In 1977 the Williams Act was amended again, at a time when there were over 30 state takeover laws. Section 13(d) [15 U.S.C. § 78m(d) (1978)] was amended to add more background information about the beneficial owners of securities, and two new subsections were added to section 13. Section 13(g) for the first time required all persons holding over a certain percentage of stocks to file with the SEC a report concerning their stock holdings (with the report to be filed on SEC Form 13g). Section 13(h) imposed on the SEC an obligation to study the 5% threshold (lowered in 1970 from the 10% threshold set in the original Williams Act in 1968) and to advise Congress whether the threshold should be lowered to something below 5%. These amendments were enacted in December 1977, yet there was no discussion in Congress or otherwise about preemption of state tender offer laws.

At Footnote 50, Brief of SEC, comments from SEC former Chairman Roderick Hills in a 1976 letter to Senator Proxmire to the effect that precommencement filing

would provide incumbent management with a defensive tool, disrupt markets, and hurt investors are noted. If the SEC is truly concerned about state takeover laws, and believes they are or ought to be preempted, why did the SEC not propose in this 1976 letter or at any other time when Congress was considering the 1934 Securities Exchange Act that Congress address the preemption issue?

Thus, Congress has on four occasions looked at this general area as well as conducting a comprehensive review of the Securities Exchange Act, but has not seen fit to affect the applicability of an increasing number of state statutes. Nor is there any suggestion that Congress perceives any conflict between state laws and the Williams Act.

Recent decisions by this Court make it clear that conflict preemption cannot be based on a speculative intention between state and federal provisions or even on a demonstrated incompatibility between state law and a hypothesized, unclear purpose of federal law.[12] For conflict preemption to be found there must be a convincing showing of empirically demonstrable incompatibility between a provision of state law and a clearly articulated significant purpose of federal law. Since *Piper* v. *Chris-Craft*[13] shows that protection of target company shareholders was the purpose of the Williams Act, preemption analysis poses the question whether there is some clear showing that this purpose of benefiting target company shareholders by giving them a fair opportunity to consider the possibility of tendering or selling all or a portion of their shares is demonstrably frustrated by state takeover laws. While

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[12] *See e.g.* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973); New York Dep't of Social Services v. Dublino, 413 U.S. 405 (1973); Goldstein v. California, 412 U.S. 546 (1973). *See also* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977).

[13] Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977).

the Idaho law promotes neutrality, even if it did not it would be valid. "Neutrality" was an attribute, or side effect, of the Williams Act, not one of its purposes.[14]

Congress regarded the deterrence of some takeover bids as tolerable if that was a necessary price to pay for the paramount goal of investor protection, for it was said both in the House and Senate Reports as well as by Senator Williams on the Senate floor that:

> While the bill may discourage tender offers or other attempts to acquire corporate control by some who are unwilling to expose themselves to the light of disclosure, [the committee believes] this is [but] a small price to pay for adequate investor protection.[15]

Yet there is no evidence that either federal or state law has actually deterred tender offers, and evidence of increased numbers of tender offers in recent years indicate that the field is active and healthy under both federal and state regulation.

This Court should focus on the gain to shareholders from added disclosure and added time to consider an offer, coupled with the distinct possibility of additional, higher offers which may occur during an extended consideration time.

A. Idaho Law Does Not Favor Target Company Management

At Footnote 45, Brief of SEC, the Commission asserts that the Idaho law favors target company management at the expense of shareholders. This is patently false. This is the *only* case where Idaho law has been applied (and

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[14] *Id.* at 29.

[15] H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) and S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) [adds the phrase "the committee believes"]; 113 Cong. Rec. 24,664 (1967) (remarks of Sen. Williams) [adds "but"].

it resulted in a successful takeover in which Great Western *chose to retain* the target company management). National experience shows that over 85% of all tender offers are successful (and no pattern can be discerned as to the reasons why any tender offers are unsuccessful).[16] The SEC has had ample opportunity to study state law effect on tender offers and to analyze friendly tender offers under state laws such as Idaho's which exempts friendly offers from state law coverage, yet can name not a single instance of a friendly, exempted takeover—or even a hostile takeover—which has occurred at the expense of shareholders. After eleven years of experience under the Williams Act the SEC cannot yet even define what a tender offer is for federal law purposes.

Both the SEC and Great Western express extreme concern over the fact that a "friendly" tender offer, approved by management of the target corporation, is excluded from coverage of the Idaho Corporate Take-Over law. [Idaho Code § 30-1501(5)(e).] What the complainants fail to point out, however, is that such a cash tender offer *will* be subject to the Williams Act both as it presently stands and as it will be affected by the SEC's proposed 30 business day rule (and other proposed rules) should such rules become effective. Clearly, this exemption under state law

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[16] A leading authority in the investor relations field and unchallenged witness at trial of this case notes:

> The SEC's obsession with entrenched management proved to be an argument made of stale pudding. A study of the death rate of target companies in the years prior to the passage of the Williams Act revealed a mortality rate of 75% in tender offers.
>
> Under the SEC's jurisdiction since then, the rate has risen to 85%. One must wonder whether the end game envisioned here was benefit of investors or a 100% mortality rate of target companies.

Chatlos, *The SEC vs. investors on tender offers*, in Ideas for Action, Harv. Bus. Rev. 6, 6 (Sept.-Oct. 1978).

is a recognition that federal law effectively regulates the friendly tender offer in a context where the State of Idaho does not wish to add an additional state law overlay to the existing fiduciary responsibility of target company management to act in a proper manner in approving a tender offer proposal.

To claim, as it continues to do, that state takeover laws somehow protect "entrenched," "inefficient" target company management seems a bizarre act on the part of the SEC in reiterating a shopworn rubric last suggested in 1967 congressional hearings. Experience under federal and state takeover laws prove the contrary. The statement is bizarre for another reason; for in a system of cooperative federalism if any jurisdiction is deemed to have an exclusive right to be concerned with a particular topic it would surely be the State of Idaho with respect to the efficiency and effectiveness of corporate management in Idaho. To invoke Idaho's concern with corporate efficiency in that State as a basis for striking down the Idaho Corporate Take-Over law in the name of either the Commerce Clause or the Supremacy Clause would be to turn federal-state relations inside out in the face of increasing solicitude for state autonomy on the part of this Court.

With an over-85% success rate for tender offers, the successful bidder can do what it will with target company management. And, the "entrenched," "inefficient" target management rubric fails for other reasons, too. In many instances tender offers are made for companies with very efficient, successful management with an excellent record. Often, selection of the target company is based not so much on the efficiency of the management as on the level of price of its stock in relation to its earnings or the worth of the company. This fact is a direct result of occurrences in the securities markets in recent years where there has been a heavy concentration of institutional interest and investing in only the largest companies, whereas smaller companies with excellent records have had little institutional interest.

Withdrawal of individual investors from the market has caused prices of these smaller companies to be depressed and not to reflect their intrinsic worth. So, they become natural targets because a bidder can afford to offer a substantial premium over market and still buy the company at what it perceives to be a favorable price—often allowing sufficient price latitude that the bidder can afford to raise its bid. [*See* Trial Tr. at 252-53, 268-69, 307 (Wheat); 336-39, 357, 360-62 (Chatlos).]

Excellence of management of many of these smaller companies has not been reflected in market price in recent years. Yet another factor for starting a tender offer is the opportunity to make money out of the tender offer "business" itself. If a target company has a market price which is relatively low in relation to what is perceived as its net worth, a tender offeror may open bidding at a premium which is less than it conceives other interested bidders may wish to bid. If the offeror comes out with an unfriendly offer with a fair expectation that some other company may well enter the bidding and top its bid, it will lose the challenge for control if it is unwilling to raise its opening bid to compete with another bidder. But the successful bidder will pay the higher price to the initial offeror which has purchased (up to 5% before the Williams Act or state laws are "triggered") target stock at a lower price. Thus, the initial tender offeror may make several million dollars profit on its decision to get the tender offer market into action.

Finally, the postulate that management is somehow "entrenched" or "inefficient" merely because it happens to belong to a target company bears its own illogic once one realizes that some target companies are also tender offerors (which, by converse reasoning, must have "efficient" or "unentrenched" management). A classic example of this illogic is Daylin, Inc. which in recent years unsuccessfully attempted takeover bids for control of Uarco,

Dymo Industries, and Narco. During its 1974, 1975, and 1976 fiscal years, Daylin incurred a net operating loss which resulted in 101 million dollars of federal tax operating loss carryovers. In February, 1975, Daylin filed a Chapter Eleven petition under the federal Bankruptcy Act, which proceeding was in effect until the end of October, 1976. At the end of its 1976 fiscal year, Daylin faced the prospect that 66 million dollars of its tax loss carryovers would expire at the end of its 1980 fiscal year if not used by that time. Predicting that its own "earnings" picture would not provide enough revenue to fully utilize this large tax advantage, Daylin contacted the investment banking firm of First Boston Company seeking potential cash tender offer acquisition candidates. During the course of its third unsuccessful tender offer attempt, for control of Narco, Daylin was itself the subject of a successful tender offer whereby W.R. Grace and Co. gained control of Daylin.

B. Idaho's Prefiling Provision Does Not Create a Conflict

Congressional failure to enact a prefiling provision after considering it is not evidence of a conflict between state and federal law. In lawmaking, many proposals are made and ultimately not accepted. It would be very awkward constitutionally to treat all those provisions that *did not* make their way into a final bill as though they represented a clear congressional judgment that those particular measures were undesirable ones. This Court could not make a judgment striking down a state law as a result of a collage of discarded provisions on the congressional cutting room floor and hope to maintain a consistency in the respect due to the states in the federal system.

There were reasons for rejecting the prefiling language proposed for the Williams Act that do not suggest conflict between the final version and state takeover laws. Both the New York and American Stock Exchanges submitted

statements to Congress that the proposed 5 day prefiling period might result in unfairness to those investors who did not get the benefit of being covered by federal law protection during the prefiling period. State law provides that protection. Finally, federalism teaches that there are many things Congress might not want to include in a federal bill or in the powers of federal agencies that it might not object to at the state level. Certain matters do not rise to a level where Congress wants to include them in national legislation, but would rather leave matters to the states. The mere fact that Congress did not pick up a particular provision does not tell us that Congress meant for the states not to do it; it only tells us that Congress was neutral on that issue.

On page 58 and Footnote 56, Brief of SEC, the Commission promotes the contention that target management benefits from advance notice of a tender offer by being able to take steps to attempt to defeat the bid. The challenge to the SEC is to demonstrate, as they have failed to do, that these actions have in fact defeated any tender offers. The SEC list of possible actions target management might take to attempt to defeat a tender offer at Footnote 56 of its Brief is not nearly as inclusive as the list already presented at pages 100 to 102 of Brief for the Appellants, and none of the actions on either list are predicated on a target company having advance notice of a tender offer or being subject to a state takeover law. With an 85% success rate in takeover bids, any "tools" available to target management hardly seem "effective."

Again attacking precommencement filing, at pages 58 and 59, Brief of SEC, the Commission claims: "Giving incumbent management the upper hand may frustrate the offer so that investors never receive the above-market prices the offeror was willing to pay." This statement is made up out of whole cloth. The SEC relies upon no experience, and the record and briefs show not a single

instance of frustration of an offer caused by state laws. There has now been extensive experience under the various state laws, yet the SEC does not refer to this experience to support its contentions. The conclusion is clear; the experience under state laws does not support the SEC contentions.

The quote from Senator Williams at Footnote 58, Brief of SEC, advancing his belief that state laws interfere with federal law objectives and purposes is belied by experience under state law and the resulting premium to investors, increase in number of tender offers in recent years with the existence of state laws, and the fact that only about 15% of target companies survive a takeover bid. If the Senator refers to the concept of "balance" or "neutrality," then he mistakes a collateral effect with a congressional purpose, and neither Senator Williams or his staff, nor the SEC or its staff, nor former SEC members can answer the question of what "balance" Congress was looking for. What do "balance" or "neutrality" mean in light of the fact that target companies almost invariably succumb to a tender offer? The terms have never been defined. If they mean that both offeror and target management should be able to communicate fairly with the affected shareholders, the state takeover laws promote such communication.

At Footnote 59, Brief of SEC, the Commission correctly notes that its newly-proposed regulations would not delay commencement of a tender offer. But commencement time is an "opportunity time" during which potential competing tender offerors may assess the market and decide whether or not to make a competing bid. In no way does state law prefiling frustrate federal law objectives.

The SEC has not made a meaningful distinction between prefiling time and a limited (10 days as in the Williams Act) period for the offer to remain open as opposed to a more lengthy period for the offer to be open

(42 days in the newly proposed SEC rules). No informed shareholder tenders his securities until the end of the offering period. Thus, the early days of the offering period are precisely the same as a prefiling period.

Perhaps the most controversial portion of the new SEC Proposed Rules is proposed Rule 14e-2 which would require that as soon as a bidder has determined to make a tender offer it may not buy any shares of the class proposed to be tendered until it makes a public announcement of its intention to make the offer. This SEC proposal is conceptually similar to state law prefiling rules and indicates a tendency on behalf of the SEC toward a philosophy of pre-offer disclosure even though the SEC may itself feel precluded from direct pre-offer notification rules.

C. The Williams Act Merely Established Federal Minimums

The disclosures provided in the Williams Act are not the sole requirements of disclosure, but establish potential minimums which in some respects may be expanded upon by the SEC. [Section 13(d) (1); 15 U.S.C. § 78m(d) (1) 1970).] And there is nothing in the legislative history of the Williams Act or the Act itself to suggest that Congress intended to forbid states from expanding on the federal minimums. [See A. at 256-257 (Wheat).] The SEC's recent Proposed Rules and Schedule[17] (hereafter SEC Proposed Rules) further evidences the fact that the Williams Act establishes minimum requirements. At page 17 of the SEC Proposed Rules there is a general discussion of the proposals and the statement:

> Additionally, minimum information requirements were provided for the solicitation or recommendation communicated to security holders.

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[17] Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240).

The statement refers to a specific portion of the Williams Act. At page 95 of the SEC Proposed Rules there is a more expansive statement:

> In the Commission's view, the provisions of Section 14(d) (6) establish minimum protection requirements and, so long as these limited, minimum requirements are complied with, a bidder may provide in its tender offer for pro rata periods in excess of the statutory requirement.

At page 99 of the SEC Proposed Rules there is a reference to proposed Rule 14d-10(c) which "would establish minimal informational requirements for the solicitation or recommendation that is communicated to security holders."

Even with regard to the startling change in SEC policy in the proposed establishment of a 30 business day period in which a tender offer must remain open, the SEC has not closed the door on consideration of establishing a longer period before a tender offer may be consummated, for it requests at page 114 of the SEC Proposed Rules:

> While the Commission believes that the length of these minimum periods is appropriate for the protection of investors, specific comment is requested as to whether the time periods of these proposals ought to be longer or shorter and, if so, what periods should be adopted and the reasons therefor.

Thus, presumably, the Commission is at least indicating its tentative conclusion that a period of even longer than 30 business days (42 calendar days) during which a tender offer must remain open might be consistent with the Williams Act purposes.

It is perfectly obvious that if Senator Williams thought he was achieving a proper "balance" in 1968, Congress by its amendments since initial passage and the SEC now consider him to be gravely mistaken. The SEC has now

proposed what the state takeover statutes have done in the interim—providing additional time during which the offer must remain open. Thus, the SEC has finally achieved a measure of wisdom in this area which was achieved years earlier by most of the states. Obviously, the state laws have served a useful function, and provide a continuing valuable laboratory role that should only be closed down by direct congressional action.

The SEC Proposed Rules have room for improvement. They do not extend the 10 day period for proration. It is rather peculiar, in seeking to protect target company shareholders, that the Commission would expand the period during which an offer must remain open to 30 business days (up from the present 7 to 10 days), the period for withdrawal to 15 days (up from the present 7 days), yet do nothing about the rather short 10 day period for proration. Even the existing Williams Act time periods are not clearly spelled out. The offering period must be derived from the fact that if the shareholder has withdrawal rights for 7 days that, even in a tender offer for all shares, the offer must remain open for 7 days since it cannot be closed before the withdrawal right ends. And, if the tender offer is for less than all the target company shares, since the proration period extends for 10 days, then the bidder simply cannot as a practical matter end his offer before the 10 day period expires. Thus, what the SEC has at last attempted to do under its rule making power is to flesh out the abstruse time periods minimally set forth in the Williams Act and provide for an explicit period of time during which the offer must remain open, which time period differs from the periods for withdrawal rights and proration. The state law laboratories have helped to provide the experience from which the SEC may draw in considering its proposed rules.

D. The SEC May Not Have the Authority to Effect its Proposed Rules

The Commission is acting under section 14(e) [15 U.S.C. § 78n(e) (1970)] in promulgating the critical time period portions of its new Proposed Rules. The authorization provides:

> The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent such acts and practices as are fraudulent, deceptive, or manipulative.

The SEC has not justified its extension of the waiting period as necessary to prevent these practices. Its only justification is the favorable experience under state laws.

It is therefore likely that the Commission's Proposed Rules will be subjected to legal challenge which, if successful, would leave state laws as the only practical, effective means where benefits beyond the bare, minimal information and time periods provided by the Williams Act may continue to promote additional disclosures and provide for an auction market.

The last sentence of Footnote 59, Brief of SEC, makes it clear that the Commission's Proposed Rules make a deliberate attempt to create a situation where compliance with both state and federal law is impossible—an attempt to create an operational preemption by agency rule though Congress was unwilling to accomplish the same by legislation. While this action is, again, questionable in light of the fact that the Commission's powers of rulemaking in this area extend only to prevention of acts and practices which are fraudulent, deceptive, or manipulative (attributes hardly ascribable to state regulation of tender offers), even if the Proposed Rules were legal in all respects all that would be required of the states would be conformity of

their laws to federal rule so as to eliminate the newly-created narrow conflict.

Finally, at page 57, Brief of SEC, the Commission claims that the "delay" engendered by state takeover laws may have a "chilling effect" on bidders which is antithetical to Congress' evenhanded regulatory scheme. Yet, the SEC's own Proposed Rule of a 30 business day (42 calendar day) "delay" period itself is a clear demonstration that a comparable extended period of time for consideration is highly desirable and beneficial to target shareholders.

CONCLUSION

For the reasons discussed above and further set forth in the Brief for the Appellants and Appellants' Reply Brief, the judgments by the courts below should be reversed.

Respectfully submitted,

PETER E. HEISER, JR.
SPECIAL DEPUTY ATTORNEY GENERAL OF IDAHO
Counsel for Appellants

April 25, 1979.

Addendum

GREEN BAY & WESTERN RAILROAD
8/15/77 .... A & K Railroad Material, Inc. $120
11/22/77 ... Bras Corporation $150
12/8/77 .... Itel Corporation $330

PET
6/8/78 ..... IC $54
7/17/78 .... IC $55

P.R. MALLORY
11/13/78 ... Dart $46
11/21/78 ... Dart $51

AIRCO
1/3/78 ..... BOC Financial Corporation $43
4/3/78 ..... Martin Marietta Corporation .....$50 (withdrew)
4/14/78 .... BOC Financial Corporation $50

UARCO
10/25/78 ... Dart $42
12/1/78 .... Daylin .....$48 (withdrew)
12/12/78 ... City Investing $52

SERVOMATION
8/7/78 ..... GDV (City Investing) $42
8/25/78 .... Liggett Food Services $46
8/25/78 .... GDV (City Investing) $47
8/28/78 .... Liggett Food Services $48.50
9/1/78 ..... GDV (City Investing) $49

THE SEVEN-UP COMPANY
5/1/78 ..... Phillip Morris Inc. $41
5/11/78 .... Phillip Morris Inc. $46
5/16/78 .... Phillip Morris Inc. $48

CONTRAN
2/20/78 .... Danco, Inc. $35
7/11/78 .... Danco, Inc. $50

COLONIAL STORES
7/10/78 .... Grand Union $30
8/8/78 ..... Grand Union $35

COLLEGE UNIVERSITY CORPORATION
7/25/78 .... California Life $29
9/27/78 .... Monarch Life .....$35 (withdrew)
10/16/78 ... Baldwin United $38.50
10/23/78 ... California Life .....$40 (withdrew)

THE DIVERSEY CORPORATION
4/21/78 .... The Molson Companies Ltd. $28
5/19/78 .... The Molson Companies Ltd. $30

DYMO INDUSTRIES
5/15/78 .... Oxford Pendaflex $24
5/25/78 .... Daylin .....$30 (withdrew)
5/25/78 .... Oxford Pendaflex $30

ALLIED THERMAL CORPORATION
9/13/77 .... Interpace $22
11/2/77 .... Jim Walker Corp. $26
11/11/77 ... Interpace $30

IMPERIAL AMERICAN ENERGY
9/27/77 .... Consolidated Oil & Gas, Inc. $17
10/12/77 ... Mesa Petroleum Co. .....$20.73 (withdrew)
10/17/77 ... Petro-Lewis $20

THE HILLHAVEN CORPORATION
4/4/78 ..... Manor Care, Inc. $13.50
5/8/78 ..... The Hillhaven Corp. $15.50
5/9/78 ..... Manor Care, Inc. $15
5/16/78 .... The Hillhaven Corp. $16.25
5/23/78 .... Manor Care, Inc. $17
5/23/78 .... The Hillhaven Corp. $18
5/24/78 .... Manor Care, Inc. $17.50

AMERICAN MEDICORP
10/7/77 .... Humana Inc. $16.83
12/21/77 ... Hilton International $20
12/30/77 ... Humana Inc. $28.75

AMERICAN FINANCE SYSTEMS, INC.
2/13/78 .... Aristar, Inc. .....$ 9.50
4/4/78 ..... Aristar, Inc. .....$11 (withdrew)
5/24/78 .... Security Pacific Corp. $10

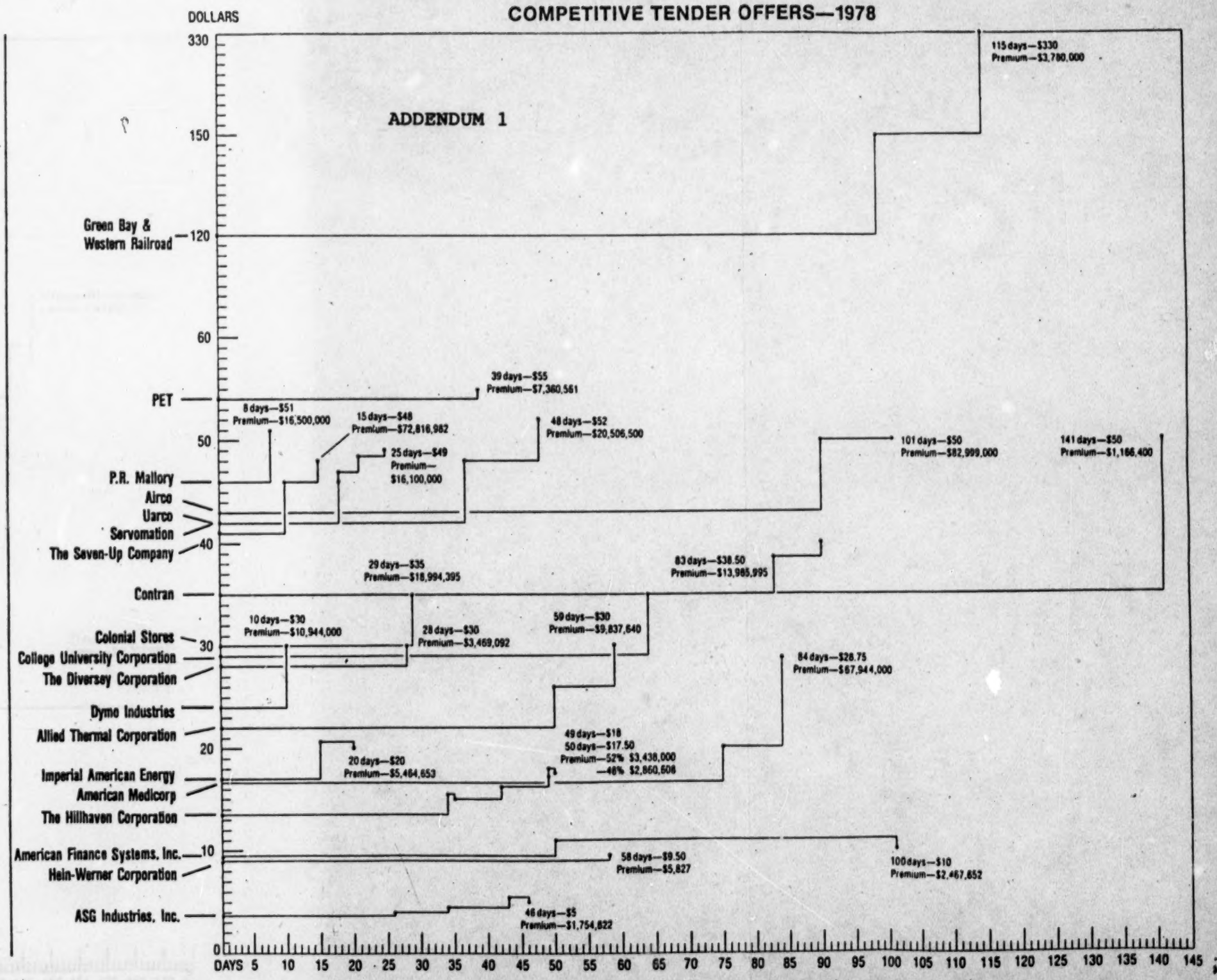
HEIN-WERNER CORPORATION
6/26/78 .... American Investment Corporation ....$ 9
8/25/78 .... American Investment Corporation ....$ 9.50

ASG INDUSTRIES, INC.
4/27/78 .... Associated Imports Inc. .....$ 3.75
5/23/78 .... Fource Glass Co. .....$ 4.00
5/31/78 .... Associated Imports, Inc. .....$ 4.50
6/9/78 ..... Associated Imports, Inc. .....$ 5.50 (withdrew)
6/12/78 .... Fource Glass Co. .....$ 5.00

WILLIAM E. CHATLOS
GEORGESON & CO.

COMPETITIVE TENDER OFFERS—1978

ADDENDUM 1



COMPETITIVE TENDER OFFERS—1977

BURGESS VIBOCRAFTERS
- 2/4/77 ..... Intermatic, Inc. $22
- 2/7/77 ..... Intermatic, Inc. $24
- 3/3/77 ..... Acme General Corp. $27

AVIS
- 5/18/77 .... Fuqua Industries Inc. $15.50
- 6/29/77 .... Norton Simon Inc. $22

CHEMETRON
- 8/25/77 .... Crane Co. $40
- 9/1/77 ..... Crane Co. $48
- 9/9/77 ..... Alleghany Ludlum $55

COCA-COLA BOTTLING COMPANY
- 10/11/77 ... MCA Enterprises, Inc. .....$30 (common) $58.50 (preferred)
- 10/19/77 ... Northwest Industries .....$40 (common) $78 (preferred)

THE CARBORUNDUM COMPANY
- 11/10/77 ... Eaton Corp. $47
- 11/29/77 ... Kennecott Copper Corp. $66

AMTEL
- 11/14/77 ... Dominion Bridge Co. $15
- 11/23/77 ... Dominion Bridge Co. $16.50

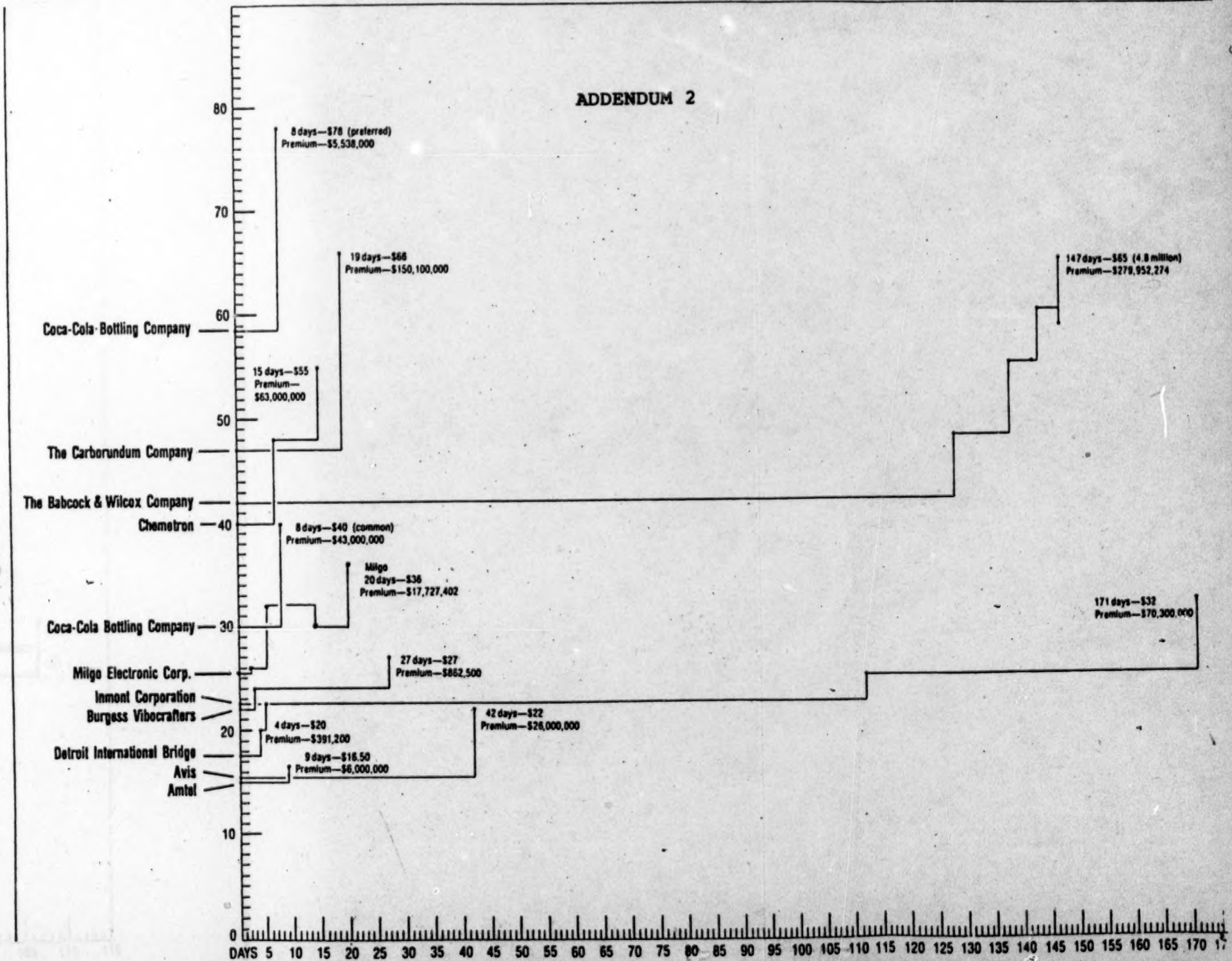
INMONT CORPORATION
- 2/22/77 .... Esmark, Inc. $22.50
- 6/14/77 .... Esmark, Inc. $25
- 8/12/77 .... Carrier $32

THE BABCOCK & WILCOX COMPANY
- 3/29/77 .... United Technologies Corp. .....$42 (all shares)
- 8/4/77 ..... United Technologies Corp. .....$48 (all shares)
- 8/14/77 .... J. Ray McDermott & Co., Inc. .....$55 (4.3 million)
- 8/18/77 .... United Technologies Corp. .....$55 (all shares)
- 8/19/77 .... J. Ray McDermott & Co., Inc. .....$60 (4.3 million)
- 8/23/77 .... United Technologies Corp. .....$58.50 (all shares)
- 8/23/77 .... J. Ray McDermott & Co., Inc. .....$65 (4.8 million)

DETROIT INTERNATIONAL BRIDGE
- 10/13/77 ... Ledeer Group $17.60
- 10/17/77 ... Wesco Financial Corp. $20
- 10/18/77 ... Ipex Group Inc. $22.50
- (5/22/77 ... Ipex Group Inc. .....$37 (withdrew)

MILGO ELECTRONIC CORP.
- 1/19/77 .... Applied Digital $25.50
- 1/21/77 .... Racal Electronics $28
- 1/24/77 .... Applied Digital $32
- 2/2/77 ..... Racal Electronics $30
- 2/8/77 ..... Racal Electronics $36

Premium—$17,727,402



WILLIAM E. CHATLOS
GEORGESON & CO.